

*a***OCBC BANK (MALAYSIA) BHD****v.****TAN CHONG KEAT & ANOR AND ANOTHER CASE***b*

HIGH COURT MALAYA, PULAU PINANG
MOHD NOOR ABDULLAH J
[CIVIL SUIT NOS: 22-110-88 & 22-142-1989]
3 MARCH 2005

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CONTRACT: *Breach - Condition - Action brought for debts written off - Writing off of debts - Implications - Whether extinguishing the debts - Estoppel - Whether applicable - Effect of - Mere suspension of right*

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The plaintiff offered and the principal borrower accepted overdraft facilities, a letter of credit and a letter of guarantee totaling a sum of RM650,000 ("said facility"), which was secured by joint and several guarantees executed by the guarantors and a third party charge over a piece of land belonging to Castle Hill Sdn Bhd ("said property"). Subsequently further facilities were granted by the plaintiff to the defendants. The whole amount was released by the plaintiff but the defendants failed to repay the loan. What had transpired in the *interim* was that the plaintiff had given the defendants a letter indicating that a certain portion of the defendants' debt towards the plaintiff ("said extinguished debt") had been extinguished ("said letter"). Subsequently the plaintiff wrote to the defendants stating that they had made a mistake *via* the said letter and that the said letter had been issued erroneously and was not meant to be construed as extinguishing the defendants' debt to them. As at the 31 January 1994, the defendants, after taking into account the write off given by the plaintiff ("written off sum") and the proceeds of the sale of the said property, owed the plaintiff RM61,187.39, which the defendants maintained had been extinguished *vide* the said letter. The plaintiff brought this suit before the court to claim for the written off sum and the said extinguished debt. The sole issue that arose for determination before this court was whether in law the plaintiff was entitled to recover the written off sum and the said extinguished debt from the defendants.

*e**f**g***Held (allowing the plaintiff's claim with costs and interests):***h*

[1] A bad debt is deemed irrecoverable but is not extinguished and the bad debt may subsequently be recovered fully or partly. It is to be observed that writing off a bad debt is more of an internal management of the financial affairs of the creditor company and it does not affect its rights and obligations under a contract, nor of the debtor. Here the plaintiff's witness explained that the said letter was a mistake and that they had

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filed actions to recover the bad debts which were deemed irrecoverable but not extinguished. The plaintiff had therefore pursued its rights under the terms of the letter of offer and guarantee. (p. 421 c, & g-h) a

[2] The essence of estoppel is a representation either expressed or implied intended to induce the person to whom it is made to adopt a course of conduct which results in detriment or loss to the representee. Here the plaintiff acted on its own to write off the defendants' debt. The plaintiff did not inform the defendants. It was communicated to the audit firm upon request. Where is the representation? Where is the encouragement or inducement leading to a course of conduct which resulted in detriment or loss? As the answer to both the questions is none, the doctrine of estoppel is not applicable. Moreover the defendants elected to remain silent at the end of the case for the plaintiff and thereby failed to place sufficient material before me from which an inference could fairly be drawn that the defendants were influenced by the plaintiff's conduct, a conduct which would be unconscionable for the plaintiff thereafter to enforce on its strict legal rights. (p. 422 a-c) b
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[3] The effect of an estoppel is not to extinguish a right but merely to suspend it. The right can be resurrected through the issuance of a notice. (p. 422 e) e

Case(s) referred to:

American International Assurance Co Ltd v. Koh Yen Bee [2002] 4 CLJ 49 CA (*refd*)
Boustead Trading (1985) Sdn Bhd v. Arab Malaysia Merchant Bank [1995] 4 CLJ 283 FC (*refd*)
Emmanuel Ayodeji Ajayi v. RT Briscoe (Nigeria) Ltd [1964] 3 All ER 556 (*refd*)
Re Darker v. Secretary of Department of Social Security [1987] 14 ALD 545 (*refd*)
Secretary Department of Social Security v. Hodgson [1992] 108 ALR 322 (*refd*) f

For the plaintiff - Tan Gian Chung; M/s Shook Lin Bok

For the defendants - Dato' Mahinder Singh (Harjit Singh Harbans Songh); M/s Harjit Singh Sangay & Co g

Reported by Sharmini Pillai

JUDGMENT

Mohd Noor Abdullah J:

This is an action by the plaintiff bank against Tan Chong Keat and Khaw Siew Suan as guarantors in Civil Action No. 22-110-1988 and against Huat Tatt Sdn. Bhd. as principal borrower in Civil Action No. 22-142-1989. Both actions are consolidated and heard together. h

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a **The Agreed Facts**

The plaintiff offered and the principal borrower accepted an overdraft of RM100,000, letter of credit for RM500,000 and a letter of guarantee for RM50,000 totalling RM650,000. The above facilities were secured by a joint and several guarantees executed by the guarantors and also by a third party charge of a piece of land belonging to Castle Hill Sdn. Bhd. Subsequently the plaintiff gave additional facilities amounting to RM2.95 million which was later reduced to RM1.95 million. The whole amount was released by the plaintiff but the defendants' failed to repay the loan.

c As at 31 January 1994 the borrowers and guarantors owed plaintiff RM2,492,850.55. From this amount the plaintiff wrote off RM1,254,196.92 leaving a balance outstanding of RM1,213,000. A further sum of RM1,218,000 being the proceeds of sale of the charged property was deducted, leaving an outstanding balance of RM61,187.39 which sum was also written off by the plaintiff. The defendants' conceded that if at all any amount was due to the plaintiff, it was only for RM61,187.39.

d **The Agreed Issue For Determination**

e The parties agreed that the sole issue for determination by this court is whether in law the plaintiff is entitled to recover from the defendants both the written off amounts of RM1,254,196.92 and RM61,187.39. My answer to the above question is in the affirmative and I accordingly give judgment for the plaintiff for the above amounts plus interest and costs.

f The following facts are highlighted to present the whole picture in its correct and true perspective. By a letter dated 11 November 1996 the borrower's auditors wrote to the plaintiff requesting for the balance of all accounts of the borrower "at the close of business on December 31, 1994 and 1995".

The plaintiff replied by letter dated 4 March 1997 stating:

As at 31 December 1994 - RM145,829.99 DR [and in words] in debit.

g As at 31 December 1995 - NIL

h On 9 September 2000, the plaintiff's solicitors wrote to the guarantor's solicitors expressing the plaintiff's "regret that the letter dated 4 March 1997 issued by them was a mistake and should not be construed to mean that the debt under the judgement of 22 January 1996 had been extinguished and/or that there was an accord or satisfaction." The guarantor's solicitor replied by letter dated 9 August 2000 disagreeing that "the letter dated 4 March 1997 was issued by mistake" and that the plaintiff is estopped from asserting that there is a debt due.

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Having focussed my sight to the whole picture in its correct and true perspective, I must first and foremost understand the meaning of a “write off”. a

In Spicer and Pegler’s *Book-Keeping and Accounts* (16th edn.) by W.W. Bigg, H.A.R.J. Wilson and A.E. Langton, it is explained that:

when a debt is found to be irrecoverable, it should be written off as a loss by means of a journal entry debiting Bad Debts Account and crediting the amount of the defaulting debtor. At the end of the accounting period the Bad Debts Account is closed by transfer to the Profit and Loss Account. Should a debt which has been written off as bad be subsequently recovered, in whole or in part, the debtor’s personal account should be debited and Bad Debts Account credited, the cash received then being credited to the debtor’s account. b

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It is observed that the bad debt is deemed irrecoverable but it is not extinguished and the bad debt may subsequently be recovered fully or partly.

In *Re Darker v. Secretary of Department of Social Security* [1987] 14 ALD 545, the tribunal explained the effect of a decision to write off a debt as follows: d

Generally the writing-off of a debt is a matter of accounting and does not affect the rights and obligations of the creditor and the debtor.

The writing-off of a debt simply acknowledges the reality that, while legally it is recoverable, in practice it is not. e

In business ‘bad’ debts are written off regularly, so that the statement of account can present a true picture of the assets of the business.

In *Secretary, Department of Social Security v. Hodgson* [1992] 108 ALR 322 Hill J expressed a similar view, namely: f

... the expression “write off is used in an accounting sense, that is to say that action is taken to write off an existing liability in the accounting records of the Commonwealth dealing with social security ... So used, the expression does not impact upon the liability of the person overpaid, although as a practical matter, once a debt has been written off, it is unlikely that recovery would be pursued. g

It is again observed that writing off a bad debt is more of an internal management of the financial affairs of the creditor company and it does not affect its rights and obligations under a contract, nor of the debtor. h

In this case before me, the plaintiff’s witness explained that the letter of 4 March 1997 was a mistake and that they have filed actions to recover the bad debts which were deemed irrecoverable but not extinguished. The plaintiff had therefore pursued its rights under the terms of the letter of offer and the letter of guarantee. i

- a* The defendants' pleaded estoppel that is to say, that the plaintiff is estopped from recovering the debt because the plaintiff had written off the debt fully. The essence of estoppel is a representation either expressed or implied intended to induce the person to whom it is made to adopt a course of conduct which results in detriment or loss to the representee. Here the plaintiff acted on its
- b* own to write off the defendant's debt. The plaintiff did not inform the defendants. It was communicated to an audit firm upon request. Where is the representation?' where is the encouragement or inducement leading to a course of conduct which results in detriment or loss? As the answer to both the question is none, the doctrine of estoppel is not applicable. (See *Boustead Trading (1985) Sdn. Bhd. v. Arab Malaysia Merchant Bank* [1995] 4 CLJ 283). Moreover the defendants' elected to remain silent at the end of the case for the plaintiff and thereby failed to place sufficient material before me from which an inference may fairly be drawn that the defendants were influenced by the plaintiff's conduct, a conduct which would be unconscionable for the plaintiff thereafter to enforce on its strict legal rights.
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- d* I am further guided by the decision in *American International Assurance Co. Ltd. v. Koh Yen Bee* [2002] 4 CLJ 49 where the Court of Appeal held that the effect of an estoppel is not to extinguish a right but merely to suspend it. The right can be resurrected through the issuance of a notice.
- e* The other case is *Emmanuel Ayodeji Ajayi (trading under the name and style of The Colony Carrier Co.) v. R.T. Briscoe (Nigeria), Ltd.* [1964] 3 All ER 556, the Privy Council held that "the principle which has been described as quasi estoppel and perhaps more aptly as promissory estoppel, is that when one party to a contract in the absence of fresh consideration agrees not to enforce his rights an equity will be raised in favour of the other party. This equity is, however, subject to the qualification (a) that the other party has altered his position, (b) that the promisor can resile from his promise on giving reasonable notice, which need not be a formal notice, giving the promisee a reasonable opportunity of resuming his position, (c) the promise only becomes
- f* final and irrevocable if the promisee cannot resume his position."
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Conclusion

- h* Having understood the meaning of the expression "write off and after seeking guidance from decided cases referred to above I ruled that the plaintiff could recover the bad debts and that the principle of estoppel is not applicable. For the above reasons I allowed the plaintiffs claim and entered judgement against the defendants for RM3,821,450.92 as at 31 March 2004 plus interest and costs.

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